IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 42

RALPH GINZBURG, DOCUMENTARY BOOKS, INC., EROS MAGAZINE, INC., LIAISON NEWS LETTER, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

REPLY FOR PETITIONERS

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1. Relying on "findings" submitted *ex parte* by the Government to support a guilty verdict entered 54 days earlier (Res. Br. 3-4),[1] the United States argues that the trial court "scrupulously sought to apply" this Court's test for determining obscenity (Res. Br. 5) and that, in deference to such findings, it is unnecessary

[1] Despite petitioners' timely request for "special findings" under Rule 23(c) of the Federal Rules of Criminal Procedure (JA 348), the trial court delegated its fact-finding function to the prosecutor (JA 349).

to examine the challenged publications, much less examine them "in the light of the record made in the trial court." *Jacobellis* v. *Ohio,* 378 U.S. 184, 196 (Brennan and Goldberg, JJ.) (Res. Br. 5, 8). The findings on which the Government relies are not entitled to such deference. *United States* v. *El Paso Natural Gas Co.,* 376 U.S. 651, 656-657. They are, in addition, insufficient to support a conviction of petitioners as to *Eros* and *Liaison* (Pet. 23).[2] Furthermore, the objectionable manner in which they were made is a separate ground for reversing all the convictions (Pet. 12-13, 21-23).

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[2] Although patent offensiveness must *conjoin* with prurient interest appeal "before challenged material can be found 'obscene' under § 1461", *Manual Enterprises* v. *Day,* 370 U.S. 478, 486 (Harlan and Stewart, JJ.), the trial court failed to find that *Eros* was either patently offsensive or that it substantially exceeded customary limits of candor in describing or representing nudity or sex (JA 353). By contrast, the trial court found that both the *Handbook* and *Liaison* went "substantially beyond customary limits of candor exceeding contemporary community standards in description and representation of the matters described therein" (JA 352) and were "patently offensive on [their] face" (JA 352, 353). The trial court's failure to find that *Eros* was patently offensive or, in other words, that it substantially exceeded customary limits of candor, is of itself sufficient to require a reversal as to *Eros. Manual Enterprises* v. *Day, supra.* The *Liaison* convictions must also be reversed. While the trial court found that *Liaison* was "published for the *purpose* of appealing to the prurient interest of the average individual" (JA 352) it did *not* find that *Liaison* had any prurient interest appeal in fact. Inasmuch as the trial court specifically found that both *Eros* (JA 353) and the *Handbook* (JA 352) did appeal to prurient interest, the omission in the case of *Liaison* is fatal. The trial court's attempt to supply these omissions in an opinion (JA 362, 367), filed three and one-half months later, came too late. This Court is "not at liberty to refer to the opinion for the purpose of eking out, controlling, or modifying the scope of the findings". *Stone* v. *United States,* 164 U.S. 380, 383; *Saltonstall* v. *Birtwell,* 150 U.S. 417, 419.

Although the Government does not dispute our contention (Pet. 17-18) that a work having redeeming social importance is constitutionally protected, it asserts that "opinion testimony cannot establish conclusively that a work has any redeeming literary or scientific [importance]" (Res. Br. 8).[3] While we agree with this statement as an abstract proposition, it is not for defendants to establish *anything* in a criminal case—much less "conclusively". Indeed, the Government's burden is especially heavy in a case affecting First Amendment rights. *Scales* v. *United States,* 367 U.S. 203, 232; *Noto* v. *United States,* 367 U.S. 290, 291; cf. *Freedman* v. *Maryland,* — U.S. —, 33 L.W. 4211, 4213. And when the record made in the trial court is weighed against this standard, or any constitutionally permissible test, none of the challenged publications is obscene (Pet. 16-18).

2. The United States argues, on the one hand, that the courts below did not balance away the social importance of *Eros* and the *Handbook* against their alleged prurient interest appeal (Res. Br. 7), and, on the other hand, that where, as here, the courts found that the predominant theme of the challenged publications was an appeal to prurient interest, the works were properly held obscene despite a "comparatively slight literary or scientific interest" (Res. Br. 8-9). These contrary assertions are a direct outgrowth of the Government's unsuccessful attempt to square the result below with *Jacobellis* v. *Ohio,* 378 U.S. 184, 191

[3] The evidence on redeeming social importance of the *Handbook* was not limited to "opinion evidence." Mrs. Serett testified that the book had been sold to physicians and other professionals (Pet. 9), a fact subsequently admitted by the Government (JA 370). Rev. Von Hilsheimer testified that he and a colleague had found the book "a useful tool" (JA 289).

(Brennan and Goldberg, JJ.), while at the same time retreating to an interpretation of *Roth* v. *United States*, 354 U.S. 476, which *Jacobellis* discredited. Respondent pinpoints this dilemma when it seeks rejection of the "hard core" pornography test petitioners urge this Court to adopt (Pet. 15-16). For, in arguing that a change in labels would not make the "obscenity" problem more solvable and that the "hard core" pornography and *Roth* tests are really coextensive (Res. Br. 9), respondent ignores the fact that *Eros* was held obscene despite the Government's explicit concession that it was not "hard core" pornography (JA 349).

The resulting inter-circuit conflict to which we previously pointed (Pet. 15) has now become sharper and more widespread. Subsequent to the filing of the instant petition, the Court of Appeals for the Tenth Circuit in *Haldeman* v. *United States*, 340 F. 2d 59, 62, held that "published materials are obscene in a constitutional sense only when they are within the area of 'hard core pornography' * * *". If the *Roth* test encompasses only "hard core" pornography, as that term is defined in cases such as *Zeitlin* v. *Arnebergh*, 59 Cal. 2d 901, this Court should grant certiorari and say so. On that basis, petitioners' convictions must be reversed. None of the challenged publications is "hard core" pornography and, in the case of *Eros*, that is admitted.

3. The Government brushes aside the trial court's violation of the requirements of Rule 23(c) of the Federal Rules of Criminal Procedure on the ground that the only finding the trial court was required to make was a finding that the challenged works were obscene under the relevant test and that that finding is implicit in the general verdict (Res. Br. 9-10). By substituting

in place of "special findings" a presumption that such findings are implicit in every guilty verdict, the Government would read Rule 23(c) out of the Federal Rules of Criminal Procedure.[4]

Special findings under Rule 23(c) serve much the same function in a non-jury case as instructions do in a jury case. *United States* v. *Palermo,* 259 F. 2d 872, 882 (C.A. 3, 1958). Just as a jury must apply the proper legal standards in arriving at its verdict, so must a trial judge in arriving at his verdict. *Wilson* v. *United States,* 250 F. 2d 312, 324 (C.A. 9, 1957). And just as a trial judge cannot instruct the jury after it returns its verdict, so a trial judge cannot instruct himself after he returns his verdict. Indeed, if a trial judge is allowed to render a verdict based upon a visceral reaction buttressed later by "facts" and "conclusions", special findings would be meaningless. *United States* v. *Forness,* 125 F. 2d 928, 942-943 (C.A. 2, 1942). Since, in this case, the findings were prepared by the prosecutor and submitted to the trial court *ex parte,* such findings were worse than meaningless. They deprived petitioners of every safeguard Rule 23(c) was designed to afford (Pet. 21-23).

4. While agreeing that the admission of the Frignito testimony concerning the effect of the *Handbook* on adolescents was improper, respondent urges that its non-prejudicial use "is entirely clear from reading the trial court's findings and opinions" (Res. Br. 10).

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[4] If the trial court had made the required findings contemporaneous with the issuance of its general verdict, petitioners would have been able to file a timely motion for a new trial under Rule 33 of the Federal Rules of Criminal Procedure on the ground that the findings were inadequate to support conviction. See discussion, *supra* at ftn. 2.

However, since the trial court's opinion specifically refers to the *Handbook's* effect upon adolescents (JA 366), it is plain here, as in *Volanski* v. *United States,* 246 F. 2d 842 (C.A. 6, 1957), that the "court [did] base its decision upon it" (Res. Br. 10). Moreover, one cannot determine from the findings in this case what elements entered into the trial judge's guilty verdict made fifty-four days earlier. Therefore, one must look to what the trial judge ruled or said during the trial to determine on what basis he found petitioners guilty immediately upon the close of trial. In addition to the erroneous admission of the Frignito testimony (JA 321-324), the record shows that the trial judge was extremely concerned with the Handbook's effect on adolescents and that this was the principal subject on which he chose to interrogate witnesses (JA 271, 272, 296, 297-298, 300-307).[5] Absence of prejudice does not "affirmatively appear" from this record. Prejudice does. Compare *Bihn* v. *United States,* 328 U.S. 633, 638; *Kotteakos* v. *United States,* 328 U.S. 750, 765.

5. One of the important questions still open under 18 U.S.C. § 1461 is whether the statute requires proof of a specific criminal intent, *i.e.,* an intent to pander to prurient interest (Pet. 21, ftn. 22).[6] If, as the Govern-

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[5] The trial judge's actions in this case are at least as revealing as the comments which demonstrated prejudice in *Volanski.* 246 F. 2d at 843, ftn. 1.

[6] Another important question concerns the meaning of the term "appeal to prurient interest" (Pet. 2, 16-17). Although the Government studiously avoids coming to grips with this issue here (Res. Br. 6), it asserts in a brief filed the same day, written by the same counsel (seeking affirmance of 25 and 15 years sentences meted out for the mailing of one book), that "appeal to prurient interest" "does not mean * * * that the actionable material must appeal to

ment now asserts, evidence of an intent to commercially exploit obscenity is irrelevant, because *scienter* is established by proof of mailing with knowledge of the contents (Res. Br. 10-11), *reliance* by the trial court on evidence of commercial exploitation requires reversal as to all petitioners. *Volanski* v. *United States,* 246 F. 2d 842, 843 (C.A. 6, 1957). If, on the other hand, evidence of a commercial pandering to prurient interest is essential, reversal must be had as to all petitioners except Eros Magazine, Inc. This is so because the district judge, following the Government's theory in the trial court,[7] actually found that evidence of criminal intent, admissible only against Eros Magazine, Inc., proved criminal intent against *all* petitioners (Pet. 20).

In either event, unless certiorari is granted and the convictions below reversed, petitioners will have been tried and convicted on the theory that *scienter* involves a commercial pandering to prurient interest (JA 351, 353) and their convictions will have been affirmed on the theory that *scienter* is a mailing with knowledge of the contents (Pet. App. 8a-9a). This is a denial of due process. *Cole* v. *Arkansas*, 333 U.S. 196, 202;

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the prurient interest *of* the average person" but rather that "it appeals to [what] the average person considers an unwholesome preoccupation with sex". (Brief for United States, *United States* v. *West Coast News Company, et al.* (C.A. 6), Nos. 15792-15795, pp. 32-33). This rejection of the *impact* or *effect* test for determing pruriency, while unstated here, is nonetheless the position of the United States and, therefore, is a compelling reason for granting certiorari.

[7] In the trial court, the theory of the prosecution was that petitioners were engaged in a general scheme and purpose to commercially exploit obscenity, and the trial court so found (JA 351, findings 3 and 4; JA 353).

Russell v. *United States,* 369 U.S. 749, 766, 768.[8] Not only will petitioners be denied due process, but the result will have serious implications for the future. So long as Questions 6(a) and 6(b) (Pet. 3) remain unresolved, the Government will be free to introduce prejudicial evidence of this kind in criminal jury and non-jury cases alike and to assert on appeal that such evidence was extraneous to conviction and, therefore, harmless. The capacity for prejudice inherent in this approach is amply demonstrated by the opinion below (Pet. App. 1a-2a, 5a, 6a).

CONCLUSION

By reason of the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[8] See also, *Wilson* v. *United States,* 250 F. 2d 312, 325; (C.A. 9, 1957); *Pearson* v. *United States,* 192 F. 2d 681, 693-694 (C.A. 6, 1951).